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No. 97-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

DENNIS WILLIAMS, ET AL.,

Petitioners,

v.

WMX TECHNOLOGIES, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in exercising its discretion to accept an interlocutory appeal under 28 U.S.C. § 1292(b) and in failing to order the District Court to grant Petitioners leave to file a third complaint.

RULE 29.6 STATEMENT

Respondent Waste Management, Inc. (formerly known as WMX Technologies, Inc.) has two nonwholly owned subsidiaries: Waste Management International P.L.C. and Wheelabrator Technologies Inc.; Waste Management Inc. has no parent companies.

Respondent Environmental Industry Associations (formerly known as National Solid Waste Management Association) has no parent companies or nonwholly owned subsidiaries.

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JOINT BRIEF IN OPPOSITION

INTRODUCTION

The Petition rests on its opening assertion that the Fifth Circuit "has denied petitioners the ordinary right to replead to correct pleading requirements that were imposed on petitioners *for the first time* at the appellate level." Pet. at 2 (emphasis in original). This premise, woven throughout the Petition, is inaccurate. In the District Court, Petitioners amended their pleading "once as a matter of course" under Rule 15(a). Later, after Respondents moved to dismiss that amended pleading, the District Court invited Petitioners to again amend "in order to plead your cause with more specificity." Petitioners declined. The District Court denied Respondents' motions to dismiss, but granted their motion for interlocutory review. On appeal, the Fifth Circuit did

not impose new and onerous pleading requirements. Instead, the Court of Appeals addressed the pervasive Rule 9(b) deficiencies in Petitioners' allegations of fraud. Petitioners concede (as they must) that these Rule 9(b) pleading requirements were "well understood." Pet. at 12.

In providing for interlocutory review of the Rule 9(b) sufficiency of Petitioners' pleading, both the District Court and the Fifth Circuit recognized that appellate review might "materially advance the ultimate termination of the litigation." The appeal was not an academic exercise on the fundamentals of Rule 9(b) pleading. It was what everyone understood it to be—a substantive review of the Rule 9(b) sufficiency of the pleading which Petitioners had embraced as their operative complaint. Petitioners understood they would be bound by the results of that review, and they are.

During the course of the interlocutory appeal, Petitioners expressly requested another chance to replead, spelling out for the Court of Appeals all of the matters they would include in a third pleading. No reason exists to upset the Fifth Circuit's exercise of its discretion in failing to grant Petitioners' request for further repleading.

COUNTERSTATEMENT

District Court Proceedings Involving the Motions to Dismiss

In the District Court, Respondents Dennis Williams and Richard Dreiling filed what was essentially a fraud-on-the-market, class action "securities fraud case." Pet. at 3. The Defendants were WMX Technologies, Inc. ("WMX"), its Chief Executive Officer Dean Buntrock ("Buntrock") and Environmental Industry Associations ("EIA"), an association engaged in lobbying, educational and informational activities on behalf of the waste services industry. The Amended Complaint alleged that

together, the three Defendants engaged in a massive fraud over seven years from 1987 through 1993. The Amended Complaint asserted that the Defendants "planned and implemented" a scheme "to convince the American public that the country was running out of [landfill] space" and that there was a national landfill capacity "crisis." Am. Compl. at ¶ 11. According to Williams and Dreiling, "[t]he gist of Plaintiffs' case is that Defendants together engaged in a prolonged fraudulent scheme to brainwash the public into believing that a 'garbage crisis' or 'landfill crisis' existed." Plaintiffs' Response to EIA's Motion to Dismiss at 5-6.

Williams and Dreiling sought to represent a class that included tens (if not hundreds) of thousands of purchasers of WMX stock over a seven-year period, and to recover class-wide damages of "several hundred million dollars." The District Court described the case as a potential "monster." Tr. of 12/1/95 Hrg. at 64-65.

Williams and Dreiling filed their original Complaint on the last business day before the expiration of the three-year statute of repose for the securities fraud claims. That eight-page Complaint, which failed to name EIA as a defendant, essentially alleged that WMX and Buntrock "engaged in a scheme to cause and permit the public issuance of false and misleading statements that a landfill capacity shortage and disposal crisis existed in the United States," and that "an employee of WMX [falsely] communicated to Plaintiffs . . . that there existed a shortage of landfill capacity." Compl. at ¶ 11. The Complaint alleged little else. There were no particularized allegations of any class-wide misrepresentations.

Williams and Dreiling concede that after filing the Complaint, they deliberately refrained from serving the summons and Complaint in order to conduct a 103-day "investigation into the matters set forth in the complaint" to search for "the facts" for their fraud allegations. Plaintiffs' Motion To Extend Time for Rule 26 Compliance With Matters in Court's Order for Conference at 2;

Plaintiffs' Motion To Extend Time for Service Pursuant to F.R.C.P. 4(m) and Motion for Alternative Service Pursuant to Texas Rule of Civil Procedure 106(b) at 1-2. More than three months after beginning the litigation, Williams and Dreiling filed and served the Amended Complaint.

The Amended Complaint greatly expanded the pleading (from eight pages and 22 paragraphs to 23 pages and 56 paragraphs). EIA, for the first time, was named as a defendant. The Amended Complaint contained four counts: securities fraud under Section 10(b) and Rule 10b-5; RICO violations; common-law fraud and civil conspiracy; and negligent misrepresentation.

The Amended Complaint alleged that in 1992 Williams and Dreiling sold their waste hauling business, Texas Sanitation Industries, Inc. ("TSI"), to WMX in exchange for shares of WMX common stock. Thereafter, the market price of WMX's stock declined. Williams and Dreiling claimed that WMX, Buntrock and EIA artificially inflated the price of WMX stock by convincing the American public that a national landfill crisis existed, that a national shortage of landfill capacity was occurring and that the country was running out of space to dispose of its garbage. Williams and Dreiling describe this as the "mass deception." Am. Compl. at ¶ 11.

Appended to the Amended Complaint were 28 pages of exhibits consisting of excerpts from 62 different news articles spanning a seven-year period. The Amended Complaint did not analyze, distinguish, or, with minor exception, even mention the contents of these 62 articles (apparently leaving that tedium to the federal courts). Nevertheless, Williams and Dreiling asserted that these news stories, when lumped together, somehow demonstrated that WMX and EIA were "disseminating the false and fraudulent myth of a landfill crisis in a huge number of ways and means." Am. Compl. at ¶ 15.

WMX and Buntrock, on one hand, and EIA on the other, filed separate motions to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted under Rule 12(b)(6). A principal basis of the motions was the failure of each of the four counts of the Amended Complaint to plead fraud with the particularity required by Rule 9(b). In their motion, WMX and Buntrock explicitly requested that "the motion be granted and that the Amended Complaint be dismissed *with prejudice*." (emphasis added.)

Prior to the District Court's ruling on the adequacy of the Amended Complaint, Williams and Dreiling repeatedly represented to the District Court that additional amendments would be filed "promptly." Contrary to these representations, Williams and Dreiling never sought leave to amend their Amended Complaint. Indeed, at the hearing on the motions to dismiss, Williams and Dreiling declined an opportunity to replead and elected to stand on their Amended Complaint. The District Court specifically asked counsel for Williams and Dreiling "[a]re you going to amend your [Amended Complaint] in order to plead your causes with more specificity." Counsel responded in part: "[w]e had hoped to do it at a later time after discovery and we do believe that our complaint at this time is sufficient as to specificity." The District Court then inquired: "Do you think your allegations for fraud are sufficient under the rules." Counsel responded: "Yes, Your Honor. I think under [Rule] 9(b) they are sufficient as alleged . . . ." Tr. of 12/1/95 Hrg. at 5.

The District Court denied the motions to dismiss without opinion. Shortly thereafter, the District Court certified for interlocutory review its order that denied the motions to dismiss. The District Court harbored serious doubt about the adequacy of the Amended Complaint. In certifying its order for interlocutory review, the District Court held that "the issues in this case involve controlling questions of law on which there is substantial

ground for difference of opinion" and that "an immediate appeal would materially advance the termination of the litigation." Pet. App. at 15a. The District Court also deemed an interlocutory appeal desirable because the legal sufficiency of the Amended Complaint was "a close question" and that the case would "involve lengthy litigation and vast amounts of discovery and expenditures." *Id.* at 14a.

Proceedings in the Court of Appeals

A three-judge panel of the Fifth Circuit (the motions panel) unanimously granted Defendants' petitions for permission to proceed with an interlocutory appeal of the order denying the motions to dismiss. A separate Fifth Circuit panel then considered the merits, electing not to disturb the decision of the motions panel. The merits panel concluded that "the amended complaint failed to state claims of fraud with the particularity required by Fed. R. Civ. P. 9(b)." Pet. App. at 12a. In its detailed review of the Amended Complaint, the Fifth Circuit found that the "amended complaint . . . although long, states little with particularity." *Id.* at 7a. It noted that oral misrepresentations supposedly made to Williams and Dreiling by a WMX employee were not accompanied by requisite descriptions of the time and place of the purported misstatements. *Id.* at 7a-8a. Likewise, with respect to excerpts from a WMX prospectus that were quoted at length in the Amended Complaint, the Fifth Circuit concluded that "Williams and Dreiling's lack of specificity as to which portion is false and why prevents this portion of the complaint from meeting the standard of pleading set out in Rule 9(b)." *Id.* at 8a.

The Fifth Circuit further held that the 62 newspaper clippings attached to the Amended Complaint did little or nothing to satisfy Rule 9(b)'s specificity requirements. The pleading deficiencies relating to these articles included: (a) the failure to "attempt to parse the articles to demonstrate which statements were fraudulent and attributable to [which defendants]," *id.* at 9a; (b) the

failure to specify "who gave information to the paper," *id.* at 10a; (c) the observation that many of the articles are simply "innocuous," *id.*; and (d) the failure of the Amended Complaint to "isolate statements [in the articles] and particularize their falsity." *Id.* at 11a.

In their Court of Appeals brief, Williams and Dreiling asked that any dismissal be with leave to replead, and presented several pages of "additional factual matters" which they claimed to be prepared to add to their pleading if they were granted leave to amend. C.A. Br. at 1-3, 15-17.

The operative portion of the Fifth Circuit opinion ordering dismissal simply stated:

> Plaintiffs have failed in two attempts to plead with particularity. Their efforts have been carefully reviewed by an able district judge. The order of the district court denying defendants' motion to dismiss is REVERSED and this case is REMANDED to the district court with instructions to dismiss.

Pet. App. at 12a. After the Fifth Circuit rendered its opinion, Williams and Dreiling filed a Petition For Rehearing and a Suggestion For Rehearing En Banc, both of which questioned whether the Fifth Circuit had instructed the District Court to dismiss the Amended Complaint with prejudice and without leave to amend. In these papers, Williams and Dreiling also asked the Fifth Circuit for leave to replead. Both the Suggestion for Rehearing En Banc and the Petition for Rehearing were denied without comment.

Although Petitioners now contend that the Fifth Circuit's opinion specifically directed the District Court to dismiss the Amended Complaint with prejudice and without leave to amend, in their Petition for Rehearing Williams and Dreiling asserted that the Fifth Circuit's "[o]pinion is unclear, however, as to whether Plaintiffs will be permitted to request leave of the district court to amend their complaint to meet the deficiencies pointed

out by the court." Pet. for Reh'g at 1. Their Petition for Rehearing went on to proffer seven more pages of "matters" that they contend could be included in further pleading amendments. Pet. for Reh'g at 6-13. The Fifth Circuit had a full opportunity to consider those additional allegations. These "facts," however, failed to save the case of Williams and Dreiling.

After remand, Williams and Dreiling then told the District Court that it was authorized to grant them leave to amend because the Fifth Circuit did not order the dismissal of the Amended Complaint with prejudice. Williams and Dreiling advised the District Court as follows:

> [T]he order of the Fifth Circuit does not specifically state that the Plaintiffs' case is to be dismissed *with prejudice*. It only states that the case is to be dismissed. In these circumstances, the District Court should not presume that the dismissal should be done with prejudice, but rather should presume that the dismissal should be done without prejudice. Because the order of the Fifth Circuit is silent on this issue, this court should . . . grant Plaintiffs' leave to amend their complaint so that the Plaintiffs will have at least on [sic] opportunity to cure the deficiencies found by the Fifth Circuit. . . . [I]n these circumstances, this Court ought to grant Plaintiffs' leave to amend their complaint before their case is finally dismissed. There is nothing in the Fifth Circuit's order which prohibits this Court from doing so.

Plaintiffs' Motion to Alter or Amend the Order of Dismissal at 2.

As the above passage demonstrates, depending upon the circumstances, the court and the relief being sought, Williams and Dreiling interpret the Fifth Circuit's opinion in completely contradictory ways. On one hand, they claim that the Fifth Circuit ordered the District Court to dismiss the Amended Complaint with prejudice.

On the other hand, they insist that the Fifth Circuit did no such thing. Williams and Dreiling apparently feel strongly both ways. These conflicting interpretations of the same Fifth Circuit opinion establish that the opinion has little (if any) application beyond the four corners of the Amended Complaint at issue. This renders Supreme Court intervention inappropriate.

Proceedings in the District Court After Remand

After the mandate issued from the Fifth Circuit, the District Court entered an order dismissing the Amended Complaint with prejudice. The District Court's order states:

> As the mandate has issued from the United States Court of Appeals for the Fifth Circuit, remanding this case with instructions to dismiss all claims, this Court
>
> ORDERS that this case is DISMISSED WITH PREJUDICE.

Pet. App. at 20a. Williams and Dreiling then moved to amend that order, requesting, *inter alia*, that the District Court permit them to further amend their Amended Complaint. In a three-page ruling, the District Court denied that motion. *Id.* at 21a-23a. Williams and Dreiling never appealed either the District Court's order dismissing the Amended Complaint with prejudice or the District Court's further order denying their request to amend the Amended Complaint.

REASONS FOR DENYING THE WRIT

According to the various arguments advanced by Williams and Dreiling before this Court and the lower courts, one of two different situations exists. Either (1) the Fifth Circuit never ruled—expressly or impliedly—on the repleading issue; or (2) the rulings of the Fifth Circuit amounted to an instruction that the District Court dismiss the Amended Complaint with prejudice and without leave to amend. First, Williams and Dreiling

bypassed the perfect vehicle to review the propriety of the judgment dismissing the Amended Complaint with prejudice when they failed to appeal the District Court's entry of the judgment. Second, the Fifth Circuit opinion is limited to a single case specific issue: whether the Amended Complaint complied with the particularity requirements of Rule 9(b). Supreme Court review is not appropriate in these circumstances.

I. THE FIFTH CIRCUIT OPINION OF WHICH PETITIONERS SEEK REVIEW DID NOT ADDRESS THE REPLEADING ISSUE

All parties agree that the Fifth Circuit never expressly instructed the District Court to dismiss the Amended Complaint with prejudice. The proposition that an appellate mandate silent on the issue of repleading affords the District Court the discretion to permit an amendment finds support in the cases of *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175, 181-82 (1920) (district court order overruling a demurrer reversed by circuit court) and *Nguyen* v. *United States*, 792 F.2d 1500, 1503 (9th Cir. 1986). If the Fifth Circuit mandate truly was "opaque" as Petitioners claims (Pet. at 10), then the repleading issue was one for the District Court. Indeed, Williams and Dreiling urged that interpretation of the mandate in the District Court.

Upon remand and after the District Court dismissed the Amended Complaint with prejudice, Williams and Dreiling sought leave to amend their Amended Complaint. In their Motion to Alter or Amend the Order of Dismissal filed with the District Court, Williams and Dreiling asserted:

> [T]he order of the Fifth Circuit does not specifically state that the Plaintiffs' case is to be dismissed *with prejudice*. It only states that the case is to be dismissed. . . . Because the order of the Fifth Circuit is silent on this issue, this Court . . . should be [sic] grant Plaintiffs leave to amend their Complaint so that the Plaintiffs will have at least on [sic] oppor-

> tunity to cure the deficiencies found by the Fifth Circuit.

Plaintiffs' Motion to Alter or Amend the Order of Dismissal at 2 (emphasis in original). The District Court rejected their position. It reasoned that the Fifth Circuit had ruled on the repleading issue, and it quoted *Gegenheimer* v. *Galan*, 920 F.2d 307, 309 (5th Cir. 1991), for the proposition that "'the district court . . . may not revisit any issues that the Court of Appeals expressly or impliedly disposed of in its decision.'" Pet. App. at 23a.[1]

If, as Williams and Dreiling argued below, the Fifth Circuit never ordered the District Court to dismiss the Amended Complaint with prejudice, then the "error" about which they now complain (namely the denial of their request to amend) was committed by the District Court, not the Fifth Circuit.[2] As a consequence, any error committed by the District Court in entering the judgment dismissing this case with prejudice and denying leave to amend could have and should have been appealed to the Fifth Circuit. In such an appeal, all of the claimed confusion caused by the "opaque . . . language" (Pet. 10) could have been cleared-up by the court best suited to do so—the Fifth Circuit. Williams and

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[1] Although WMX and Buntrock acknowledged that "the mandate did not specify whether the dismissal would be with or without prejudice," they did argue that "the clear intent of the Fifth Circuit" was to preclude any further amendment of the Amended Complaint. WMX's and Buntrock's Reply in Opposition to Plaintiffs' Motion to Alter or Amend at 8. EIA advocated a similar position before the District Court. EIA's Memorandum in Opposition to Plaintiffs' Motion to Alter or Amend Order of Dismissal at 6-8.

[2] Indeed, language found in the Petition suggests Williams and Dreiling believe it was the District Court that erred. "In summary, the Fifth Circuit's disposition *was understood* by the district court to require dismissal of petitioners' claims with prejudice and to require denial of plaintiffs' motion for opportunity to replead." Pet. at 10 (emphasis added).

Dreiling never appealed the District Court's order dismissing the Amended Complaint with prejudice. Williams and Dreiling cannot raise that challenge. Not here. Not now.

Perhaps most importantly, the vacillating positions advocated by Williams and Dreiling on the implications of the Fifth Circuit opinion belie Petitioner's claim that the opinion will serve as some sort of watershed on the repleading issue. *See* Pet. at 3 ("A precedent that denies plaintiffs such fundamental procedural rights, if allowed to stand, would alter federal pleading and motion practice in a manner contrary to the clear intent of the Federal Rules of Civil Procedure"). The Fifth Circuit's opinion does not present the repleading issue with the clarity necessary to support this Court's grant of certiorari.

II. THE ISSUE OF DISMISSAL WITH PREJUDICE WAS AN ISSUE FAIRLY WITHIN THE CERTIFIED ORDER OF THE DISTRICT COURT

Citing 28 U.S.C. § 1292(b), Williams and Dreiling contend that the Fifth Circuit lacked the jurisdictional authority to reach the issue of whether a dismissal of the Amended Complaint ought to be with prejudice. Petitioners assert that under Section 1292(b), appellate jurisdiction extends only to " 'any issue fairly included within the certified order' " Pet. at 11 (quoting *Yamaha Motor Corp.* v. *Calhoun*, 116 S. Ct. 619, 623 (1995)). According to the quoted authority, under Section 1292(b), a Court of Appeals' "scope of review includes *all issues material to the order in question.*" *Yamaha Motor*, 116 S. Ct. at 623 (quoting Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 628-629 (1975)) (emphasis added; brackets appearing in *Yamaha Motor* omitted).

In its entirety, the certified order provided:

> Pending before the Court are the Motions to Dismiss (Documents #22, 23) filed by defendants. Having considered the motions, submissions, and the arguments of counsel at a hearing conducted before the Court on December 1, 1995, the Court
>
> ORDERS that the Motions to Dismiss (Documents #22, 23) are DENIED.

Pet. App. at 16a. The WMX and Buntrock motion to dismiss (Document No. 22) explicitly requested "that the Amended Complaint be dismissed *with prejudice*." WMX and Buntrock Motion to Dismiss at 2 (emphasis added). Hence, the issue of whether to dismiss the Amended Complaint with prejudice is an issue "fairly included within the certified order" denying that motion.

Williams and Dreiling have always understood that the issue of dismissal with prejudice falls within the Fifth Circuit's jurisdiction. In at least five different briefs filed in the Fifth Circuit, Williams and Dreiling contended that **"[i]f this Court finds Plaintiffs' [Appellees'] Complaint is defective under either Rules 9(b) or 12(b)(6), the Complaint should not be dismissed with prejudice."**[3] Williams and Dreiling also requested that the Fifth Circuit grant them leave to

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[3] Plaintiffs' Response in Opposition to Defendants WMX Technologies, Inc. and Dean Buntrock's Petition for Permission to Appeal the Interlocutory Order Certified by the District Court on March 5, 1996 Pursuant to 28 U.S.C. § 1292(b) at 5 (emphasis in original); Plaintiffs' Response in Opposition to Environmental Industry Association's Petition for Permission to Appeal the Interlocutory Order Certified by the District Court on March 5, 1996 Pursuant to 28 U.S.C. § 1292(b) at 3-4 (emphasis in original); Appellees' Brief in Response to Brief of Appellants' WMX Technologies, Inc. and Dean Buntrock at 3 (emphasis in original); Appellees' Brief in Response to Brief of Appellant EIA at 3 (emphasis in original); Appellees' Brief In Response to Brief of Appellants' WMX Technologies, Inc., Dean Buntrock and Environmental Industry Associations at 47 (emphasis in original).

amend: "In the unlikely event that this Court determines that the Complaint should be dismissed, it should remand this case to the District Court with leave for Appellees to amend their Complaint." Appellees' Br. at 48. In addition, the "**PRAYER**" appearing at the conclusion of their three appellees' briefs to the Fifth Circuit "respectfully request[ed] that this Court . . . remand this case to the District Court with instructions to grant Appellees leave to Amend their Complaint to attempt to cure [any] pleading defects *identified by the Fifth Circuit*." (emphasis indicates language appearing only in appellees' final brief.) All along, Williams and Dreiling understood and acknowledged that the certified order and the appeal of that order included the issues of repleading and dismissal with prejudice.

In addition, the inability of a court of appeals to dismiss with prejudice would be contrary to the policy behind allowing permissive appeals. The Petition correctly notes that to satisfy Section 1292(b), a District Court must find that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." This requirement is designed to promote the "expedition of cases pending before the district courts." S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958); *see also* Note, 88 Harv. L. Rev. at 609 (goal of § 1292(b) is to provide "an opportunity to review orders before they result in fruitless litigation and wasted expense"). As the Seventh Circuit has stated, "the purpose of Section 1292(b)" is "to speed litigation and conserve judicial resources . . . ." *In re Healthcare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir. 1996).

Depriving the Fifth Circuit of the power to dismiss the Amended Complaint with prejudice would, in the present case, render the Section 1292(b) appeal incapable of "materially advanc[ing] the ultimate termination of the litigation." Under Petitioners' theory, the Fifth Circuit would be relegated to returning the defective pleading to

the District Court for more repleading and more future appeals. Restricting the authority of the Court of Appeals in the manner suggested by the Petition engenders expense and delay. To have any serious prospect of materially advancing the ultimate termination of this case, the Fifth Circuit necessarily possessed the authority to dismiss the Amended Complaint with prejudice.

The Petition makes no effort to defend the Rule 9(b) adequacy of the allegations of the Amended Complaint. Rather, as its primary theme, the Petition reasons that the Court of Appeals should have coupled its instruction to dismiss the Amended Complaint with explicit permission to file a third pleading.

> [S]ettled law and practice obligated the Fifth Circuit to afford petitioners the opportunity to file an amended pleading to correct its [amended] pleading in light of the court's views. It is for this reason that this petition for certiorari is brought to this court's attention.

Pet. at 10.[4] Williams and Dreiling cannot shift to the federal courts their responsibility to plead a claim that complies with Rule 9(b). Williams and Dreiling have no right to obtain from a federal court an advisory opinion of "the court's views" on the adequacy of their pleading together with a license to amend. Any such expectation is especially inappropriate here, where the Fifth Circuit accepted the appeal and scrutinized the Amended Complaint with the understood objective of "materially advancing the ultimate termination of the litigation."

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[4] The Petition goes so far as to imply that any dismissal with prejudice remains improper until and unless a plaintiff seeks leave to file a third complaint. "[W]ithout reasoning or citation to authority, [the Fifth Circuit] seemingly holds that a party that exercises its lawful right to amend under Rule 15(a) commits a procedural waiver of its *right* to seek leave to amend at a later time." Pet. at 17 (emphasis added).

III. THE DISTRICT COURT AND THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE CERTIFIED ORDER INVOLVED A CONTROLLING QUESTION OF LAW

Petitioners argue that interlocutory appeal of the District Court's Order denying the motions to dismiss was improvidently granted because there was no "controlling question of law" under Section 1292(b).[5] Pet. at 11-14. Review by this Court of that issue is unwarranted.

The order certified by the District Court and over which the Fifth Circuit accepted jurisdiction involved a controlling question of law. "A question of law may be deemed 'controlling' if its resolution is quite likely to affect the further course of the litigation, even if not certain to do so." *Sokaogon Gaming Enterprise Corp.* v. *Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996); *see also In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982) ("[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court."), *aff'd for lack of a quorum*, 459 U.S. 1190 (1983). In this case, the question of law at issue was, in the District Court's own words, "whether [Petitioners] have satisfied the pleading requirements of 9(b)." Pet. App. at 14a.[6] The

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[5] An order may be certified for interlocutory appeal under § 1292(b) if it (1) "involves a controlling question of law" (2) "as to which there is a substantial ground for difference of opinion" and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

[6] Whether or not a pleading satisfies the particularity requirements of Rule 9(b) is a question of law. *Aldridge v. Lily-Tulip, Inc.*, 741 F. Supp. 906, 915 (S.D. Ga. 1990), *aff'd in relevant part, rev'd in part*, 953 F.2d 587 (11th Cir. 1992). As such, the Court of Appeals reviews the question of whether a pleading satisfies the particularity requirements of Rule 9(b) de novo. *Shushany* v. *Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993); *see also Healthcare Compare Corp.*, 75 F.3d at 279 ("Whether the district court

question of a pleading's adequacy is a "controlling" question of law. Depending on how the question was answered, the case would either proceed or be dismissed.

That the Order denying the motions to dismiss was properly certified in this case is supported by the Seventh Circuit's decision in *Healthcare Compare Corp., supra*, a case on which the District Court relied in granting certification. Pet. App. at 14a. *Healthcare Compare Corp.* is virtually identical to this case, both factually and procedurally. In that case, the District Court denied a motion to dismiss a complaint in a securities fraud class action for failure to meet the particularity requirement of Rule 9(b), but certified its order for interlocutory appeal under Section 1292(b). The District Court reasoned that certification was proper "because the case presented a 'close question,' and because a 'massive amount of discovery [is] lurking in this case.' " 75 F.3d at 279 (Seventh Circuit's brackets). The Seventh Circuit accepted the interlocutory appeal, reversed the district court's order, and dismissed the plaintiffs' claims. As in this case, the controlling question of law was "[w]hether the district court correctly refused to dismiss the complaint." *Id.*

Nor is *Healthcare Compare Corp.* the only case in which interlocutory appeal was granted over an order denying a motion to dismiss under Rule 9(b). *See, e.g., Aldridge* v. *Lily-Tulip, Inc. Salary Retirement Plan Benefits Comm.*, 953 F.2d 587, 590 (11th Cir. 1992) ("Although the district court concluded that the Plaintiffs stated a RICO claim, it certified the immediate appeal to this court of its determination of the . . . pleading of fraud with particularity issue[]").

Petitioners contend that the courts below impermissibly substituted a " 'close question' formula" borrowed from *Healthcare Compare Corp.* in place of Section

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correctly refused to dismiss the complaint is a question of law that we review de novo.").

1292(b)'s "controlling question of law" requirement. Pet. at 12. Not so. As noted, one of the requirements of Section 1292(b) is that the order at issue involves a question of law "as to which there is a substantial ground for difference of opinion." Here, the District Court ruled that "the issue of whether plaintiffs have satisfied the pleading requirements of 9(b) is a close question" (Pet. App. at 14a), but that was merely the District Court's shorthand statement that the issue satisfied Section 1292(b)'s substantial-ground-for-difference-of-opinion requirement. Far from relaxing the controlling question requirement of Section 1292(b), the District Court expressly determined that the requirement was met. *See* Pet. App. at 15a ("This Court finds that the issues in this case involve controlling questions of law as to which there is a substantial ground for difference of opinion").

Contrary to the Petition's contention (Pet. at 12-14), there is no conflict between the decision below and *S.B.L.* v. *Evans*, 80 F.3d 307 (8th Cir. 1996). That case arose in a different factual and procedural context and was decided on the basis of a legal principle—ripeness—which is inapplicable here. In *S.B.L.*, the district court certified under Section 1292(b) an order denying a defendant's motion for summary judgment on a sexual harassment claim brought under Title IX of the Education Amendments Act of 1972. The Eighth Circuit held that the interlocutory appeal had been "improvidently granted" on ripeness grounds, explaining that there were too many "unresolved factual issues bearing on the framing and formulation of the legal questions." 80 F.3d at 11, quoting *International Soc'y for Krishna Consciousness* v. *Air Canada*, 727 F.2d 253, 256 (8th Cir. 1984). No such ripeness problem obtains in this case, where the certified order denied a motion to dismiss rather than a motion for summary judgment. Here, the question is whether petitioners' complaint, on its face, satisfies Rule 9(b). To determine that, the Fifth Circuit accepted as true all of the factual allegations made in the Amended Complaint. Therefore, unlike

S.B.L., in this case there were no issues of fact requiring resolution before the legal issue could be addressed.

The Petition warns that "danger" lies in the Fifth Circuit's opinion, characterizing it as a harbinger of "a second opinion practice inconsistent with the policy of restricting interlocutory appeals to 'exceptional circumstances.'" Pet. at 13 (quoting *Healthcare Compare Corp.*, 75 F.3d at 285 (Ripple, J., dissenting). No such danger exists. In the first place, the District Court must certify the interlocutory order for review, an implicit acknowledgment that its order may contain error. Next, Section 1292(b) places the decision of whether to accept the interlocutory appeal of an otherwise unappealable order within the unfettered "discretion" of the Court of Appeals (28 U.S.C. § 1292(b)), with the determination made on a case-by-case basis. Under Section 1292(b), even when the district court certifies an otherwise unappealable order for interlocutory review, the Court of Appeals ultimately controls the appeal process by accepting or rejecting the interlocutory appeal. As a further protection, the merits panel may reconsider and, if necessary, vacate the decision of the motions panel to accept the interlocutory appeal in the first place. *Healthcare Compare Corp.*, 75 F.3d at 279-80. Hence, the Court of Appeals has not one but two opportunities to refuse to accept an appeal under Section 1292(b).

IV. THE COURT OF APPEALS' JURISDICTION EXTENDS TO THE ISSUE OF AMENDMENT

The Petition suggests that the District Court is the court of first, last and only resort with respect to permitting or denying pleading amendments. The petition contends, "[d]iscretionary pleading matters reside with the district courts, and the court of appeals should not reach into such matters." Pet. at 4. According to the caption of Petition Section III, **"THE TRIAL COURT HAS EXCLUSIVE DISCRETION TO PERMIT OR DENY AMENDMENTS."** *Id.* at 14 (emphasis in original). But Williams and Dreiling present neither

legal authority nor persuasive argument concerning why questions of repleading fall outside the jurisdiction of the federal courts of appeal. Section 2106 of Title 26 of the United States Code provides for the contrary:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Indeed, "[t]he power granted by 28 U.S.C. Sec. 2106 to appellate courts to dispose of a case on appeal is broad." *MGPC, Inc.* v. *Dep't of Energy*, 763 F.2d 422, 434 (Temp. Em. Ct. App. 1985); 15A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3901 at 25 (2d ed. 1992).

The appellate court's power to review and reverse the decision of a District Court on the repleading issue is demonstrated by the authority upon which the Petition relies, *Foman* v. *Davis*, 371 U.S. 178 (1962). In *Foman*, the trial court granted a motion to dismiss and denied the plaintiff's motion to amend the complaint. This Court reversed the decision of the trial court, denying leave to amend the complaint, and remanded with instructions to permit the amendment. *Id.* at 181-82. Obviously, this Court did not conclude in *Foman* that "the trial court has exclusive discretion to permit or deny amendments."

Moreover, by repeatedly requesting that the Fifth Circuit instruct the District Court to grant them leave to amend their Amended Complaint, Williams and Dreiling concede the authority of the Fifth Circuit to address and decide this issue. *See supra* at 7, 13. The Fifth Circuit's exercise of its discretion on that issue is limited to the Amended Complaint and the unique circumstances

presented. Nothing about that exercise merits Supreme Court review.

Adopting the position advanced in the Petition—that the Fifth Circuit lacked the authority to dismiss the Amended Complaint with prejudice—would eviscerate the Court of Appeals' "broad power to dispose of the case" by precluding it from disposing of the case at all. Pursuant to Section 2106, the court of appeals "may remand the cause and direct the entry of such appropriate judgment . . . as may be just under the circumstances." This authority empowers the court of appeals to dismiss a complaint with prejudice even where the district court did not. *See United States* v. *Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995) (court of appeals modifies a judgment to dismiss certain claims with prejudice). Indeed, under Section 2106, a court of appeals has the authority, in the first instance, to require the entry of summary judgment even in favor of a non-moving party. *See Abrams* v. *Occidental Petroleum Corp.*, 450 F.2d 157, 165-166 (2d Cir. 1971).

In this case, the Fifth Circuit had before it a pure question of law, namely "[w]hether the district court correctly refused to dismiss the complaint." *Healthcare Compare Corp.*, 75 F.3d at 279; *see also Aldridge*, 741 F. Supp. at 915 ("the issue of whether plaintiffs pled fraud . . . with sufficient particularity under Rule 9(b) is a controlling question of law"). As a question of law, the Court of Appeals reviews the issue "de novo." *Healthcare Compare Corp.*, 75 F.3d at 279. Allowing the Fifth Circuit to perform a de novo review of the Amended Complaint, while circumscribing the relief it can grant to some kind of advisory recommendation, transgresses not only the "broad discretion" conferred by Section 2106, but also defeats the "materially advancing" precondition of Section 1292(b).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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